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In The
Supreme Court of the United States

October Term, 1966

No. 204

ROBERT C. BOHANNAN, JR., Appellant,

v.

STATE OF ARIZONA, ex rel.
DARRELL F. SMITH,
The Attorney General, Appellee.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

APPELLANT'S RESPONSE TO MOTION TO DISMISS

John P. Frank
Room 900
114 West Adams Street
Phoenix, Arizona 85003
Attorney for Appellant

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Appellant has been declared by the court below, in original quo warranto proceedings, to be forever barred from holding public office. The appellant had no opportunity for jury trial; there was no complaint asking for any such relief, or notice of it; and there was thus no clear information of the charge against him, no confrontation of witnesses, no freedom from self-incrimination. Appellant contends that this denies due process and clearly conflicts with the rights specified in *United States* v.

Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946; and that the statute is, independently, a bill of attainder.

The State replies:

1. The State challenges the substantiality of the federal question. We continue to rest squarely on *United States v. Lovett, supra*, which the State does not mention. We rest further on our earlier argument as to notice, hearing, right to effective counsel, self-incrimination and jury trial, stressing that the State has not seen fit to respond at all to any of the authorities presented.

2. The State contends that we did not timely raise our federal questions. As we pointed out in our opening brief, we first raised those questions on rehearing below. But we had no earlier occasion to do so:

(a) The State never asked for the relief which the court below gave; its sole request was for a show cause order. None was ever issued, and instead a final judgment was handed down. The quo warranto statute (original bf., p. 7, n.) gives as its sole remedy exclusion from office or a fine, but says nothing about permanent bar from office.

(b) Now we know better. Now we know that under Arizona law as declared by the Arizona Court for the first time in this case, a person can be permanently barred from office on an application for a show cause order, without even a request that this be done. Now we know that a remedy statute which expressly prescribes a remedy is to be read as if it prescribed some other and extremely offensive remedy. Now we know that Arizona has a procedure by which a person can be forced to answer and make admissions as here occurred.

But all this is quite a surprise. When a state court opinion takes new ground, which could not reasonably be expected, thus opening a federal question, the claim may be raised on petition for rehearing; it is then "timely, since it was raised at the first opportunity." *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 678, 60 S. Ct. 451, 74 L. Ed. 1107 (1930).

3. The State contends that the opinion rests on the adequate state grounds that a state can "impose reasonable, nondiscriminatory requirements for its public servants." Of course it can. But it cannot create a procedure for determining whether a given public servant has violated those requirements without regard to the Federal Constitution, and, specifically, to the procedures specified in *United States v. Lovett, supra.*

"The failure of the state court to pass upon the federal claim is not conclusive. Only if the non-federal ground is adequate will review be declined." Stern & Gressman, *Supreme Court Practice* 107 (3d ed.), and cases cited. The decision of state law may not "stifle a federal claim" or "evade vindication of federal rights," *id.* at 112. It may not provide a procedure under which federal rights cannot be effectively raised; *Henry v. State of Mississippi,* 379 U.S. 443, 446-47, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965).

Appellant's federal rights under *United States v. Lovett, supra,* have been stifled and evaded. The motion to dismiss should be denied.

Respectfully submitted,

John P. Frank
Attorneys for Appellant.

July, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

BOHANNAN *v.* ARIZONA EX REL. SMITH, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 204. Decided October 9, 1967.

PER CURIAM.

The motion to dispense with printing the motion to dismiss is granted. The motion to dismiss is also granted and the appeal is dismissed for want of a properly presented federal question.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, dissenting.

Appellee applied in the court below for a writ of *quo warranto*. The petition asked that appellant be ousted "from the office he presently holds as Member of the State Board of Public Welfare of the State of Arizona, and [that] his office [be declared] vacant so that a successor may be qualified as provided by law." Appellee referred in its petition and brief to the provisions of Ariz. Rev. Stat. § 38-447, which provides that any official who violates the statutory prohibition against having an interest in contracts made by him in his official capacity "shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding any office in this state." Appellee, however, asked the court below only to require appellant "to show cause why his position as a Member of the State Board of Public Welfare should not be declared vacant and why he should not be found to unlawfully hold said office, so that a successor may be qualified as provided by law."

Appellant filed a motion to quash the application on the ground that under the statutory scheme removal from office could be imposed only upon one who had been found guilty in a criminal proceeding of violating the statutory provisions. That motion was denied. Appellant then answered the application, acknowledging that certain mortgage transactions between the Arizona Retirement Board and the Associated Mortgage and Investment Company took place while he was a member of the former and president and director of the latter. Oral argument was denied, the case being decided on the briefs.

Up to that point, therefore, the matter was presented as a question of state law—it was contended that the state statutes did not permit removal from office prior to a criminal conviction. The court, however, not only ruled that appellant should be excluded from his office as a Member of the State Board of Public Welfare but also "forever disqualified from holding any public office in the State of Arizona." To reach this conclusion, the court construed the Arizona statutes to require a criminal conviction if a fine or imprisonment were to be imposed on the public official, but only a "judicial determination of the fact upon which the disqualification rests," if disqualification were the sanction to be imposed. The *quo warranto* proceeding before the court was held to offer a sufficient "judicial determination of the fact" to exclude appellant from the office he held and to bar him permanently from office.

In his petition for rehearing appellant challenged on federal constitutional grounds the court's use of the civil *quo warranto* proceeding to disqualify him permanently from office. He asserted that the statute, as construed by the court, permitted the permanent barring of a person from public office in a civil proceeding lacking vital elements of due process. Appellant also contended that the statute, as construed, constituted a bill

of attainder since it operated to inflict punishment without the constitutional safeguards of a judicial trial.

It seems obvious that until the court had interpreted the statute in appellant's case to allow permanent disqualification in a *quo warranto* proceeding in which the petition asked only for a show-cause order and that appellant be discharged from his present office, appellant had, as a practical matter, no reason to raise the federal claims he presents to this Court. Appellee did not ask for a declaration of permanent disqualification in its petition for *quo warranto*. The Arizona statute that expressly provides for the judgment to be entered in a *quo warranto* case, Ariz. Rev. Stat. § 12–2045, does not mention permanent disqualification from office. That section provides only that "when a defendant is adjudged guilty of usurping or intruding into or unlawfully holding an office, franchise or privilege, judgment shall be given that the defendant be excluded from the office, franchise or privilege. The court may also impose upon defendant a fine not exceeding two thousand dollars, which, when collected, shall be paid into the state treasury."

If a federal question arises because of an unexpected construction of a state statute by the highest state court, the question is timely raised for purposes of review by this Court if it is presented in the petition for rehearing. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 50 St. Ct. 451, 74 L. ed. 1107.

A declaration that a person is permanently barred from any future public office raises constitutional issues that simple removal from office does not. Such a declaration sweeps broadly and may destroy the individual's right to a livelihood in the field of his greatest competence. The serious nature of any such holding demands that the rules of procedural due process be complied with strictly. I believe that the issues raised are substantial and were properly presented below. Probable jurisdiction should be noted, or at the very least we should take the case and hear it argued, postponing the question of jurisdiction to the merits.